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No. 85-870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

METROPOLITAN COUNTY BOARD OF EDUCATION OF NASHVILLE AND DAVIDSON COUNTY TENNESSEE, *et al.*,
Petitioners,

vs.

ROBERT W. KELLEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari To The
United States Court of Appeals For the Sixth Circuit

REPLY BRIEF

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REPLY BRIEF

The issues presented by the Petition for Certiorari concern the proper application of the Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. §1988, to a thirty year old school desegregation case in which several desegregation plans, comporting with the ever-developing case law and factual circumstances, have been implemented in Nashville, Tennessee. The Sixth Circuit improperly applied this attorneys' fees statute which awards fees as costs, holding that attorneys fees could be awarded in 1982 for long-closed aspects of the case, including appeals for which the Court of Appeals had repeatedly refused to award costs, and actions taken long before a comprehensive and final desegregation plan was entered and implemented in 1971. In straining to reject the amount of fees awarded to the

plaintiffs by the District Court, the Sixth Circuit not only reversed or ignored its own precedent, it also applied principles inconsistent with this Court's decisions in *Marek v. Chesney*, ____ U.S. ____, 87 L.Ed.2d 1 (1985), the Eleventh Amendment, and various circuit court opinions dealing with costs and finality, and it usurped the District Court's special function in attorneys' fees litigation. This decision forecasts an exponential increase in protracted attorneys' fees litigation.

Although full argument on the merits of the questions raised in the Petition for Certiorari is properly reserved for briefing on the merits, we take this opportunity to reply to several points raised in the respondents' Brief in Opposition.

I.

A Plain Meaning Interpretation Of The Cost Language In 42 U.S.C. §1988 Is Not A Meaningless Word Game. Rather, It Is An Interpretation Which Is Consistent With Congressional Intent, With This Court's Holding In *Marek v. Chesney*, ____ U.S. ____, 87 L.Ed.2d 1 (1985), And Other Circuit Court Holdings, With The Eleventh Amendment, And With Efforts To Shorten Attorneys' Fees Litigation

When Congress enacted 42 U.S.C. §1988, permitting the award of attorneys' fees to prevailing plaintiffs "as part of the costs," it specifically states that attorneys' fees are to be treated "like other items of costs." S.R. 94-1011 at 5913.[1] At the time this statute was enacted, Rule 39(a), Federal Rules of Appellate Procedure, provided for the recovery of costs for prevailing parties, 'in keeping with the principle...that all items expended in the prosecution of a proceeding should be borne by the unsuccessful party."[2] Without even referring to the expressed Con-

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[1] *See* Petition for Certiorari, n. 15 at p. 15.

[2] Advisory Committee Notes to Rule 39, Federal Rules of Appellate Procedure.

gressional intent or to the extended discussion and adoption of the plain meaning interpretation of "costs" in 42 U.S.C. §1988 in *Marek v. Chesney,* ____ U.S. ____, 87 L.Ed.2d 1 (1985), the plaintiffs characterize the clear linkage between costs in Rule 39 and attorneys' fees awarded as costs in 42 U.S.C. §1988 as merely a "semantic game." (Brief in Opposition, p. 15.)

The plaintiffs consider *Marek v. Chesney* and the other circuit court cases cited in the Petition for Certiorari to be consistent with the Sixth Circuit's failure to link costs and fees in this case. Certainly *Marek* dealt with the relationship between a different procedural rule (Rule 68) which provides for an award of costs to a party if the ultimate judgment is not more favorable than its offer of judgment made before trial. Yet, nowhere did this Court in *Marek* indicate that it was playing a game when it painstakingly traced and linked the cost language in the procedural rule and the attorneys' fees statute.

Similarly, in the other cases which the plaintiffs dismiss as inexplicably consistent with the Sixth Circuit's opinion, several courts of appeal have equated costs under various procedural rules with costs under the Attorneys Fees Awards Act of 1976. In *Gary v. Spires,* 634 F.2d 722 (4th Cir. 1980), the Fourth Circuit reversed the trial court's award of fees pursuant to 42 U.S.C. §1988, because the cost provisions of Rule 54(d), Federal Rules of Civil Procedure had not been met. Rule 54(d) is, of course, the trial court counterpart to appellate rule 39. In *Bond v. Stanton,* 630 F.2d 1231 (7th Cir. 1980) and *Knighton v. Watkins,* 616 F.2d 795, 798 (5th Cir. 1980), the Seventh and Fifth Circuits also held that an application for fees under 42 U.S.C. §1988 is an application for costs at the trial level, and is governed by Rule 54(d), Federal Rules of Civil Procedure. Indeed, the Sixth Circuit's own decision in *Fulps v. City of Springfield,* 715 F.2d 1088 (6th Cir. 1983), was the first to link costs in offers of judgment under Rule 68 to costs in 42 U.S.C. §1988, and was relied upon by this Court in *Marek*. Surely these courts have not all been engaged in a useless word game.

In similar fashion, the plaintiffs seek to dismiss the inherent Eleventh Amendment problem created by the Sixth Circuit in *Kelley*, arguing that the Metropolitan Board of Education is not a state, and that, in any event, this Court eliminated any possible Eleventh Amendment problem with attorneys' fees in *Hutto v. Finney*, 437 U.S. 678 (1978). In making the bare assertion that the Board of Education is not a state or a state agency, the plaintiffs ignore that public education in the state of Tennessee is now and has always been a state function.[3] More importantly, most attorneys' fees cases involve states, state agencies, or state officials. Thus, if 42 U.S.C. §1988 is to be interpreted uniformly, regardless of the nature of the defendants, the cost language must be given its plain meaning. As Judge Kennedy wrote in dissent (A. 18-19), unless fees are awarded as costs there is no clear indication that Congress intended to abrogate the Eleventh Amendment by permitting an award of attorneys' fees against states. *E.g. Atascadero State Hospital v. Scanlon*, 473 U.S. ____, 105 S.Ct. 3142, 3148 (1985), *Hutto v. Finney*, 437 U.S. 678, 695-98 (1978).

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[3] The plaintiffs rely upon *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 280 (1977) for the proposition that the Metropolitan Board of Education is not a state agency. (Brief in Opposition, p. 17.) However, this Court noted in *Mt. Healty* that the question is one of state law, and Tennessee law provides otherwise.

In *Leeper v. State*, 103 Tenn. 500, 534-535 (1899), the Supreme Court of the State of Tennessee long ago declared:

> "[T]he schools, in which are educated and trained children who are to become rulers of the commonwealth, are matters of state, and not local jurisdiction; that in such matters the state is a unit, and the legislature a source of power; that the establishment and control of public schools is a function of the general assembly, both under the Constitution and because it is a matter of state concern...."

See also Tennessee Constitution, Article XI, §12, and Title 49 of the Tennessee Code.

Finally, the plaintiffs seek to distinguish costs under Rule 39 and costs awarded as fees pursuant to 42 U.S.C. §1988 because the District Court is somehow better equipped to handle the issues. While the plaintiffs concede that at least two circuits have specifically provided for factual determinations to be made at the appellate level, the locus of the factual determination concerning rates or specific hours to be compensated is not the point of the requirement that costs be awarded to a prevailing plaintiff before he is entitled to fees. (Kennedy, A. 18, n. 1.) The award of costs by an appellate court constitutes a finding that the party receiving those costs has prevailed on the appeal.[4] Conversely, an appellate court's refusal to award costs to a party constitutes a finding that the party has not prevailed. This should make the trial court's job simpler, even if reference to the District Court is necessary to determine such issues as hourly rates. As Judge Kennedy wrote in dissent: "In the rare situation where the appellate court disallows costs entirely, the court very likely has a good reason for doing so, a reason which may or may not be apparent to the District Court when it decides a subsequent motion for attorneys' fees." (A. 18).

Thus, the plain meaning of the term "cost" serves an overriding and important purpose. It places the initial determination of who may be entitled to fees as successful plaintiffs under the applicable statute in the hands of those judges who read the briefs, heard the arguments, and decided the case, at or near the time the appellate decision was rendered. Such a construction can only help to eliminate protracted attorneys' fees litigation.

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[4] This of course does not mean, as plaintiffs suggest, that every party who prevails on appeal is entitled to costs including attorneys' fees. The cost award is merely a prerequisite for those who are otherwise eligible to receive fees under 42 U.S.C. §1988.

II.

The Majority's Holding That The 1971 Desegregation Order Was Not A Final And Discrete Step In The Litigation Foreclosing A Subsequent Award Of Attorneys' Fees Under The 1976 Civil Rights Attorneys Fees Awards Act Is Inconsistent With Its Own Characterization Of That Order In 1981, As Well As With The Standards For Finality Utilized In Other Circuits In Similar Situations.

In 1981, the Sixth Circuit Court of Appeals in this very case refused to permit the Board of Education to implement a new desegregation remedy mandated by the District Court that year because it found that the old 1971 plan was a *final one* which should not be modified until the Sixth Circuit had an opportunity to closely examine the proposed modifications. *Kelley v. Metropolitan County Board of Education,* No. 81-5370 (6th Cir. August 19, 1981) (S.A. 156).[5] In conformity with this characterization of the 1971 plan, the District Court in 1983 held that the 1971 plan was a discrete and final step in the desegregation litigation, and that the plaintiffs could not reopen that final order by a motion for fees made several years later. (A. 50-53.) Now the Court of Appeals has *recharacterized* the 1971 plan in its *en banc* opinion, holding that the 1971 order was not a final order in the eyes of the parties.

The plaintiffs never address these inconsistencies in their Brief in Opposition. Instead they argue that no inconsistencies exist between the Sixth Circuit's criteria for finality in attorneys' fees litigation and that applied in other circuits. Yet the inconsistencies in the Sixth Circuit's own opinions in 1981 and 1985 (S.A. 156, A. 3-6, 32) point toward different standards for finality—one objective (the 1981 substantive decision) looking toward the nature of the order in question and the other subjective (the 1985 attorneys' fees decision) looking toward the parties' subjective expectations.

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[5] *See,* Petition for Certiorari, p. 23.

In contrast, the criteria used in *Henry v. Clarksdale Municipal Special School District*, 579 F.2d 916 (5th Cir. 1978), and *Wheeler v. Durham City Board of Education*, 585 F.2d 618 (4th Cir. 1978), were objective in nature. That is, the courts looked to the nature of the remedial order as did the District Court in this case (A. 51-52), not the intent of the parties, and found that proceedings after the pivotal orders would necessarily be supplemental in nature. In Nashville, as in these cases, liability and remedy were fixed in 1971, and if changed circumstances had not occurred in the intervening decade, the 1971 remedy would be in place here today.[6] This is what the Sixth Circuit recognized in 1981 when it termed the 1971 remedy a final one, applying the same objective standard utilized in other cases. Thus, the Sixth Circuit standard is not consistent with that used in other circuits, and indeed, it is inconsistent with its own standards previously applied to the substantive aspects of this case.

The plaintiffs argue further that any such inconsistency, if it exists, is of no import, because they know of no other recent cases where this issue has arisen.[7] The defendants respectfully submit that this is an issue which may well arise at any time in many other desegregation cases across the country where jurisdiction has been retained to monitor progress under a comprehensive desegregation plan. Should changes in circumstances, contemptuous activities, or adverse effects mandate a change in a desegregation remedy, this issue will quite likely resurface. Moreover, this issue *will* certainly arise again in this very case if hearings are held in the District Court on

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[6] The defendants strongly object to plaintiffs' repeated efforts to suggest that the motivation for the District Court's modification of the desegregation plan in 1981 was school board misconduct. (Brief in Opposition, p. 5.) The District Court has repeatedly stated that it was the 1971 plan itself, despite the good faith efforts of the board towards implementation of that plan, which caused population shifts resulting in resegregation. (A. 66-67.)

pre-1971 fees. Prior to 1971 there were several final remedial orders entered by the District Court and Sixth Circuit, and such orders required the implementation of new desegregation plans comporting with the law and facts as they existed at that time. (Petition for Certiorari, n. 1 at p. 1.) The hazy and subjective line drawn by the Sixth Circuit will undoubtedly produce further litigation in this very case.

III.

The Sixth Circuit's Usurpation Of The District Court's Discretion In Awarding Attorneys' Fees Pursuant To 42 U.S.C. §1988 Warrants The Exercise Of This Court's Supervisory Jurisdiction

In their Brief in Opposition, plaintiffs argue that there is no overriding reason to review the Court of Appeals' usurpation of the District Court's discretion in awarding fees because the relevant standards have previously been addressed by this Court in *Hensley v. Eckerhart,* 461 U.S. 424 (1983), and *Blum v. Stenson,* ____ U.S. ____, 79 L.Ed.2d 891 (1984). In this argument the plaintiffs address only the calculation of the hourly fee by the District Court, but in so doing, the plaintiffs underscore the inherently flawed approach toward fee awards taken by the Sixth Circuit and the importance of this Court's consideration thereof.

The plaintiffs admit that *Blum v. Stenson,* ____ U.S. ____, 79 L.Ed.2d 891 (1984), mandates fee awards which fall "within the parameters of customary community rates." (Brief in Opposition, p. 24.) As outlined in the defendants' Petition and in the dissenting opinions (A. 23, 25-28), the hourly rates applied by

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[7] The plaintiffs have cited *Gaines v. Dougherty County Board of Education,* 775 F.2d 1565 (11th Cir. 1985) in support of their argument that the Sixth Circuit ruled properly concerning the finality of the 1971 order. In *Gaines,* however, no final order was implemented pursuant to *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971) until 1980-81. 775 F.2d at 1567.

the District Court ($100.00 for experienced counsel and $60.00 for associate counsel) were well within these parameters. Yet the Court of Appeals *required* the District Court to award plaintiffs' senior counsel his own personal billing rate, a rate which was higher than the prevailing community rate.

In rejecting the District Court's fact-finding concerning both rates and the finality of the 1971 order,[8] the Court of Appeals substituted its own fact-finding for that of the District Court without ever stating that the District Court strayed from the proof presented to it. Such a usurpation of the District Court's role, particularly in attorneys' fees litigation where the reasonableness of a fee award is to be examined under an abuse of discretion standard,[9] forecasts an unending litany of appeals from attorneys' fees awards in the Sixth Circuit, and so departs from the accepted practice in attorneys' fees litigation that review pursuant to this Court's supervisory jurisdiction under Rule 17(a), Rules of the Supreme Court, is appropriate.

Respectfully submitted,

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[8] For a full discussion of the finality issue, see Section II, *supra,* and Petition for Certiorari, pp. 23-24.

[9] *Johnson v. Georgia Highway Express,* 488 F.2d 714, 717 (5th Cir. 1974).